Supreme Court, U.S.
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NO. 94-1004

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

NATHANIEL WHITE,
PETITIONER

V.

ROBERT E. RUBIN, AS
SECRETARY OF THE U.S. DEPARTMENT
OF THE TREASURY,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

NATHANIEL WHITE
PETITIONER - "PRO SE"
P.O. BOX 23201
CHICAGO, ILLINOIS 60623
(NO PHONE)

40 pp

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PETITIONER'S REPLY BRIEF

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PURPOSE OF PETITIONER'S REPLY BRIEF

Petitioner makes this reply to conform with Supreme Court Rule 15.6 - "A reply brief addressed to arguments first raised in the brief in opposition may be filed by any petitioner,..."

PETITIONER'S ARGUMENT

I. RESPONDENT'S PREVIOUS ARGUMENTS

Previously, respondent's arguments had been the following:

A. RESPONDENT'S ARGUMENT BEFORE EEOC:

On June 2, 1992, IRS Regional Counsel, Dennis J. Conlon, and IRS Senior Attorney, Robyn R. Gillion via and thru Office of Equal Opportunity Programs - Director, Ronald A. Glasser forwarded to Equal Employment Opportunity Commission (to Ms. Dolores Rozzi - Director, Office of Review and Appeals) the Agency Response To Appeal citing the following argument:

****

"The Appellant did not file his

notice of appeal until April 8, 1992, which was far beyond the prescribed period. He alleges that his filing period should be extended under 29 CFR §1613.233(c) because he was prevented from filing timely by circumstances beyond his control, specifically, that the Agency concealed its hiring of incompetent personnel to record the hearing by deceptively referring to the personnel as court reporters. However, his own letters to the Director of OEOP show that he reviewed the transcripts and that he believed that they were not verbatim before he received the FAD. Therefore, he had all the knowledge that he needed for filing an appeal well before the 20-day time limit began to run. The Agency accordingly takes the position that the time period for filing

a notice of appeal should not be extended under 29 CFR §1613.233(c)." (See Appen. P; U.S. Dist. Crt. Exh -D)

****

Thus respondent stated that petitioner should have filed appeal based upon a review of the transcripts and his belief that they were not verbatim. This argument was contrary to court interpretation of "prevented by circumstances beyond his control" within the EEOC regulations. A person is "prevented by circumstances beyond his control" for submitting a discrimination charge until the time when "facts that would support a charge of discrimination under Title VII were apparent to a person with reasonably prudent regard for his rights similarly situated to the plaintiff." Wolfolk v. Rivera, 729 F.2d

1114, at 1117, (7th Cir. 1984). The argument was not used in U.S. District Court or U.S. Court of Appeals by respondent.

B. RESPONDENT'S ARGUMENT BEFORE U.S. DISTRICT COURT:

During the period August 21, 1992 through August 20, 1993, before U.S. District Court, respondent argued in a Fed. R. Civ. P. 12(b)(1) motion that 29 CFR §1613.233(a) is jurisdictional and should not be treated as a statute of limitations allowing principles of equity to be invoked for petitioner's late filing to EEOC on April 8, 1992.

****

" The parties central dispute herein is whether the twenty-day limit for filing an EEOC appeal is a jurisdictional

requirement of a statute of limitations." (See Pet. App. C-12.)

Honorable Magistrate Judge Bobrick wrote "Here rather than recommend the granting of defendant's 12(b)(1) motion, we confine our recommendation to the dismissal of plaintiff's complaint." (See Pet. App. C-21 - footnote.)

****

However, Honorable Judge Alesia, U.S. District Judge, wrote in his Order dated August 23, 1993, "... The R&R (Magistrate's Report) is adopted in its entirety. Defendant's motion to dismiss is granted." (See Pet. App. D-2.) Thus Respondent's 12(b)(1) motion was left with its final disposition unclear as no court opinion was written by the U.S. District Judge.

C. RESPONDENT'S ARGUMENT BEFORE U.S. COURT OF APPEALS:

During the period October 18, 1993 through July 29, 1994, before the U.S. Court of Appeals (7th Cir.), respondent reiterated the Fed. R. Civ. P. 12(b)(1) motion for jurisdictional bar of consideration of petitioner's appeal. The U.S. Court of Appeals in its opinion explained away respondent's 12(b)(1) motion argument stating such argument should be settled based upon the trend of case law, and that 29 CFR §1613.233(a) was clearly a statute of limitations and not jurisdictional.

II. RESPONDENT'S NEW ARGUMENT BEFORE U.S. SUPREME COURT:

Now, after writing a Question Presented, and case Statement to exclude

consideration of the Agency's actions of "affirmative misconduct" in Respondent's Opposition Brief, respondent argues by summarizing a new argument. (See Brief of the Respondent in Opposition ("BRO") pg (I) and pgs 2-5.)

Respondent's new argument can be summed up as follows: (Parts 1 & 2)

PART 1: (BRO. 7)

****

"Petitioner received the the transcripts of the proceedings before the AJ on December 13, 1991. As of February 28, 1992, the last day of the 20-day filing period, petitioner had the following information: (1) He believed that the transcripts he received from the agency on December 13, 1991, were

inaccurate; (2) he knew that the agency had rendered its final decision in reliance upon the transcripts of the proceedings before the AJ; (3) the agency's final decision did not mention or address petitioner's concerns regarding the accuracy of the transcripts (Pet.29); (4) he knew that, although he had written three letters, he had not received a response from the agency to his concerns regarding the inaccuracies he perceived in the transcripts (Pet.31-33); (5) he knew that the two people who transcribed and recorded the proceedings before the AJ were not licensed as court reporters by the State of Illinois (Pet. 17, 25); and (6) he knew that he had only 20 days from February 8, 1992, to file a notice of appeal."

****

In Part 1 of respondent's argument, item nos. (1), (2), (3), (4), and (5) are fallacious for the following reasons: As of February 28, 1992, petitioner knew the following: (1) On March 26, 1991, AJ had ordered the Agency to hire court reporters (Pet. App. G); (2) On June 11 & 12, 1991, AJ held EEOC administrative hearing with Agency's hired court reporter to record the hearing; (3) On December 2, 1991, EEOC District Director, John Rowe via letter informed petitioner that, "... the original and three copies of the hearing transcripts." were mailed to DIR-Office of Equal Opportunity Programs ("OEOP") Washington, D.C. (Ronald Glasser's office) (Pet. App.H); (4) On December 13, 1991, petitioner received a

non-verbatim hearing transcript along with a letter from DIR-OEOP, stating a reply to his office was necessary for any comments to be considered concerning the hearing, stating it would assure that parties have a full and fair opportunity to present their respective cases. (Pet. App. I); (5) On December 26, 1992, January 22, 1991 and sometime after January 28, 1992, DIR-OEOP received letters stating that the transcript was not verbatim as required by 29 CFR §1613. 218(h) and should be corrected before making the final agency decision (FAD) (Pet. App. J, K, & L); (6) On February 3, 1992, petitioner received certifications from Dept. of Professional Regulations - State of Illinois, stating neither of the two women hired by the Agency was listed on

their roster as being licensed by Illinois. Petitioner knew this evidence was not concrete as last names could have been changed due to marriage. (See Pet. 47); (7) On February 8, 1992, petitioner received the FAD from Treasury Dept., Washington, D.C. stating that EEOC and Treasury rules and regulations had been authority used in making the decision and that comments from petitioner had been received and entered into making of the final decision. (Pet. APP. M) Due to the letter, petitioner had no reason to believe that a final decision was made without correcting the transcript as of February 28, 1992.; (8) As of February 28, 1992, petitioner knew of no official of the U.S. Government misinforming him about the administrative processing of

the EEO complaint and thought that the State of Illinois certification was an error or fallacious since the AJ had allowed the woman at hearing to perform as a court reporter and the Agency had hired them as court reporters.

Only item (6) in Part 1 of respondents argument is factual. Although petitioner knew about the 20-day deadline, he had no reason to file appeal anywhere during that period. (See Pet. 47)

PART 2. (BRO 6-7)

Respondent further states in the new argument:

****

"Before the EEOC, petitioner claimed that, despite repeated attempts, he was unable to obtain a verbatim

transcript from the agency to support his appeal and that he was unable to proceed without the supporting documentation. Section 1613.233, however allows petitioner 20 days to file a notice of appeal and an additional 30 days to file supporting materials. Petitioner's alleged inability to obtain an "accurate" transcript from the agency by February 28, 1992, did not prevent him from notifying the EEOC of his intent to appeal the agency's decision by that date. <The EEOC held that, under the regulations, petitioner "should have notified the Commission that he intended to appeal the agency's (final decision) within the 20-day time period even though he allegedly did not have all of the documents necessary to support the appeal at that time." Pet. App F3.> As

this Court noted in Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984), "(o)ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence."

Petitioner contends that the agency committed "affirmative misconduct" by leading him to believe that its final decision was based on an accurate transcript, Pet. 30, 37, 45-49, and by failing to inform him otherwise until the 20-day filing period had expired, Pet. 34-35, 38, 44, 54, 64. He argues that such misconduct justified an extention of the filing period. Petitioner claims that, had the agency's final decision been based on a review of an accurate transcript, he would not have appealed the dismissal of his

case."

****

Respondent's argument in Part 2 is erroneous for the following reasons: (1) Petitioner argued before the EEOC under 29 CFR §1613.233(c) ..." that circumstances beyond his control prevented the filing of a Notice of Appeal within the prescribed time limit.." with basis of appeal being violation of 29 CFR §1613.218(h) - "The hearing shall be recorded and transcribed verbatim." (See Appen. Q and U.S. Dist. Court Complaint, Exh-B, pgs. 1-3); (2) Petitioner alleged that the Agency committed "affirmative misconduct" for its actions contrary to Equal Employment Opportunity Commission's Regulations, which included misrepresentation, deception, and

concealment. (See Pet. 23-35, 45 for petitioner's reasons for "affirmative misconduct".)

****

Respondent's new argument is an attempt to state, "Petitioner had enough facts as of February 28, 1992, was not diligent, and should have filed notice of appeal with EEOC timely. Therefore equity principles should not be invoked for petitioner to seek merits of his EEO complaint." ***** However, since the record of this case details the Agency's misrepresentation, deception, and concealment of facts which would have prompted petitioner to file a timely appeal notice to EEOC, respondent's new argument is groundless. The record also reflect petitioner's diligence. Neither the EEOC or courts, District or Appeals,

dismissed this case based upon lack of petitioner's diligence. The case was dismissed in all instances without consideration of respondent's actions which constituted "affirmative misconduct", for petitioner filing late notice of appeal to EEOC. It has long been a principle of this court that, " Where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of statute of limitations does not begin to run until the fraud is discovered, though there may be no special circumstances or efforts on part of party committing fraud to conceal it from other party." Holmberg v. Armbrecht 66 S.Ct. 582 at 585 (1946). "A corollary of this principle, often found in cases

where wrongful concealment of facts is alleged, is that a party responsible for such wrongful concealment is estopped from asserting the statute of limitations as a defense. Mr. Justice Black gave a classic statement of this corollary in Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231, at 232-33 (1959): "... no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases both law and equity courts and has frequently been employed to bar inequitable reliance on statute of limitations". Reeb v. Econnomic Opportunity Atlanta. Inc., 516 F.2d 924, at 930 (5th Cir. 1975). Since petitioner discovered the misrepresentation and concealment with

respect to preparation of the non verbatim transcript on March 31, 1992, the time for appeal to EEOC under 29 CFR §1613.218(h) should begin running on April 1, 1992 and end April 20, 1992. Petitioner's appeal to EEOC on April 8, 1992 should be accepted as timely under principles of equity of this court.

CONCLUSION

For the previously stated reasons in Petition For A Writ Of Certiorari, (filed Dec. 5, 1994), and foregoing reasons, petition for a writ of certiorari should be granted.

Dated: March 14, 1995

Respectfully submitted,

Nathaniel White
Petitioner - "PRO SE"
P.O. Box 23201
Chicago, ILL. 60623

EXHIBIT - P
AGENCY RESPONSE TO APPEAL

DEPARTMENT OF THE TREASURY

WASHINGTON

JUN 02 1992

RE: Complaint of Nathaniel White and
Nicholas F. Brady, Secretary of the
Department of the Treasury
TD Number 90 -3126
Appeal Docket No.: 01922270

Dear Ms. Rozzi:

Enclosed, as required, are the following items indicated by an "X" for the above cited appeal:

●X● Agency Comments

If you have any questions regarding this matter, please contact Lisa Jones of my staff at 343-9075.

Sincerely,

/s/ Ronald A. Glasser
Ronald A. Glasser
Director
Office of Equal
Opportunity Program

Ms. Dolores Rozzi, Director
Office of Review and Appeals
Equal Employment Opportunity
Commission
P.O. Box 19848
Washington, D.C. 20036

Enclosure

cc: Robyn R. Gilliom
Nathaniel White

BEFORE THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OFFICE OF FEDERAL OPERATIONS

Nathaniel White, Appellant,	OFO Docket No. 01922270
v.	TD Case No. 90-3126
Department of the Treasury, Agency.	

AGENCY RESPONSE TO APPEAL

I. INTRODUCTION

The appellant is employed by the Internal Revenue Service as a GS-12 revenue agent. He alleges discrimination based on race and sex in a continuing pattern of harassment by his immediate supervisor. His complaint was heard by an EEOC Administrative Judge on June 11 and 12, 1991, who issued a recommended decision on November 6, 1991. The recommended decision was transmitted to the Office

of Equal Opportunity Programs (OEOP), Department of the Treasury, on December 2, 1991, along with the investigative file and the original and three copies of the hearing transcripts.

On December 11, 1991, OEOP mailed a copy of the hearing transcript and decision to both the Appellant and the Agency's representative. Both parties were given seven calendar days from receipt of the transcript and recommended decision to comment on the analysis, findings and recommended decision. Both parties were also advised that it would be appropriate to comment of the hearing itself if either side believed that they were denied a full and fair opportunity to present their case. The Appellant's admits that

he received these materials on December 13, 1991. He submitted his comments to OEOP on December 20, 1991.

On February 4, 1992, the Department of the Treasury rendered a final agency decision (FAD) finding that the evidence was not sufficient to support the Appellant's claims of discrimination based on race and sex. Enclosed with the FAD were the Appellant's appeal rights. The Appellant received his copy on February 8, 1992.

The Appellant filed his instant appeal on April 3, 1992. He alleges that the Agency did not hire competent personnel to produce a verbatim record or transcript of the hearing as required by 29CFR §1613.218(h). He requests that the Commission rescind the FAD and issue a ruling by default in his favor. He

further alleges that he was unable to file timely appeal "due to gathering concrete evidence to substantiate the basis for appeal."

II. FACTS

On April 19, 1991, the Agency issued a purchase order to AIM Reporting Service for the services of a court reporter to record the proceedings of an EEOC hearing on June 11 and 12, 1991. The Agency instructed the vendor to supply an original and three copies of the transcript to the EEOC Administrative Judge within two weeks of the hearing. The hearing was held on June 11 and 12, 1991, and the transcripts from both days were certified by Anne I. Maziorka, Notary Public, on June 26, 1991.

III. ISSUES

Whether the time limit for filing a notice of appeal should be extended because circumstances beyond the Appellant's control prevented him from filing his notice of appeal within 20 days after receipt of the FAD.

Whether the FAD should be ordered rescinded and a ruling entered in favor of the Appellant due to the Agency's alleged procurement of unqualified personnel to prepare a verbatim record of the hearing held on June 11 and 12, 1991, before the Administrative Judge.

IV. ANALYSIS

A. Timeliness

The Appellant admits in his notice of appeal that he received the transcripts on December 13, 1991. On

December 20, 1991, he wrote to the Director of OEOP, Ronald A. Glasser, that he did not believe that the hearing transcript was a verbatim record as required by 29 CFR §1613.218(h). On January 16, 1992, he again wrote to Mr. Glasser that he was "certain" that the furnished hearing transcript was not a verbatim record.

The Appellant thereafter received the FAD on February 8, 1992. At that time he was advised that an appeal to EEOC had to be submitted within twenty (20) calendar days of the date he received the FAD. Therefore, his appeal to the FAD should have been submitted by February 28, 1992.

The Appellant did not file his notice of appeal until April 8, 1992,

which was far beyond the priscribed period. He alleges that his filing period should be extended under 29 CFR §1613.233(c) because he was prevented from filing timely by circumstances beyond his control, specifically, that the Agency concealed its hiring of incompetent personnel to record the hearing by deceptively referring to the personnel as court reporters. However, his own letters to the Director of OEOP show that he had reviewed the transcripts and that he believed that they were not verbatim before he received the FAD. Therefore, he had all of the knowledge that he needed for filing an appeal well before the 20-day time limit even began to run. The Agency accordingly takes the position

that the time period for filing a notice of appeal should not be extended under 29 CFR §1613.233(c).

B. MERITS

The Appellant alleges that the Agency hired incompetent personnel to record and transcribe the hearing. His evidence consists of a certification from the Illinois Department of Professional Regulation that the transcription service hired by the Agency did not use reporters licensed under the Illinois Certified Shorthand Reporters Act of 1984. However, the State of Illinois does not require electronic sound reporters to be licensed. Furthermore, the EEOC regulations do not contain any requirement that the Agency procure a

licensed shorthand reporter. The federal statute cited by the Appellant refers to United States district courts, not administrative hearing before the EEOC. Therefore, the Appellant has not produced any evidence that the reporting service contracted by the Agency was not qualified to prepare a verbatim record of the hearing as required by 29 CFR §1613.218(h).

Finally, the Appellant has not cited a single example of testimony in the transcript which he believes was incorrectly transcribed, nor has he cited any specific error in the Administrative Judge's recommended decision that was caused by an inaccurate transcription of the testimony. Therefore, even if errors do

exist in the transcript, he has not demonstrated that any harm resulted from such alleged errors.

V. CONCLUSION

Based upon the foregoing, the Agency requests that the Commission dismiss the Appellant's appeal as untimely filed and affirm the final agency decision on its merits.

Respectfully submitted,

DENNIS J. CONLON
Regional Counsel

by: /s/ Robyn R. Gilliom
ROBYN R. GILLIOM
Senior Attorney, GLS

APPENDIX - Q
PETITIONER'S APPEAL LETTER TO EEOC

Nathaniel White
P.O. Box 23201
Chicago, ILL. 60623

April 8, 1992

Director Office of Federal Operations
Equal Employment Opportunity Commission
1801 L Street, N.W., Suite 5000
P.O. Box 19848
Washington, D.C. 20036

RE: Complaint of Nathaniel White and Nicholas F. Brady, Secretary of the Treasury
TD Number 90-3126
EEOC Number 210- 91-3022X

Dear Director:

This letter is to serve as a request for appeal of the above referenced case under 29 CFR Section 1612.233 (c) ... "that circumstances beyond his or her control prevented the filing of a Notice of Appeal within the prescribed time limit...". I did receive a final

decision from the Department of the Treasury on February 8, 1992. However, due to gathering concrete evidence to substantiate the basis for appeal, no timely appeal could be made prior to this date. The basis for appeal is that a violation of 29 CFR Section 1613.218 (h)-Record of Hearing was made by the U.S. Treasury/ Internal Revenue Service (Agency). The CFR Section requires that the hearing shall be recorded and transcribed verbatim. The transcript, produced by personnel hired by the Agency, was not verbatim and contained wide discrepancies of actual hearing testimonies. The fact that the Agency hired incompetent personnel to record and transcribe the hearing was concealed from me through deception of referring to the personnel as court reporters.

There were two people involved in recording the hearing, one to record by electronic audio tape recorder and another to transcribe that taped recording. Neither one of the people hired were Official Court Reporters. Without the actual verbatim testimonies, no valid and proper analysis could have been performed by the Administrative Judge and no valid and proper final decision could be rendered by the Agency. The Agency adopted the Administrative Judge's decision on February 4, 1992. I had previously notified the Agency three times that the transcript was not in conformity with 29 CFR 1613.218 (h) as it was not verbatim and, prior to any final decision being rendered, a comparison should be made to

the original electronic recording taped at the hearing. The Agency delayed in responding to my request for the comparison until after my appeal time to EEOC had expired. The Agency made no comparison, stating that I had not given specific evidence that the transcript was defective enough to effect the outcome of the case in any material respect. However, the Agency also admitted that it had no copy of the audio electronic tape recording of the hearing as that was not part of the contract with the personnel hired. I attempted to obtain a duplicate copy of original audio electronic tape recording from the personnel hired by the Agency without any success. The person contracted to produce the transcripts is not cooperating and I can't get any

copies of the original recording. The enclosed statement of facts will demonstrate that I did not have concrete knowledge of incompetency of personnel hired by the Agency until March 31, 1992. This appeal is being filed eight days after documentation from the State of Illinois showed that fact. Copies of all relevant third party documentation will verify or demonstrate my request for this appeal under 29 CFR 1613.233 (c), as circumstances beyond my control existed in recognizing the incompetence of the Agency's hired personnel due to concealment and gathering the third party documentation to prove it.

Sincerely,

/s/ NATHANIEL WHITE
Nathaniel White,
Complainant, Pro Se